



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/02123/2019

THE IMMIGRATION ACTS

**Heard remotely at Field House
On 16 April 2021 via Skype for
Business**

**Decision & Reasons Promulgated
On 08 June 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**FS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D. Revill, instructed by Sunrise Solicitors

For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily the directions given by the First-tier Tribunal, the decision of the First-tier Tribunal, the grounds of appeal and the parties' subsequent written submissions, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: the parties were content that the proceedings had been conducted fairly in their remote form.

1. This is an appeal against a decision First-tier Tribunal Judge Chana promulgated on 23 November 2020 dismissing an appeal by the appellant, a citizen of Pakistan born on 22 March 1981, against a decision of the respondent dated 22 January 2019 refusing his human rights claim.

Factual background

2. The appellant arrived in this country on a student visa in October 2010, valid until 16 March 2012. Following an application that was refused on 4 April 2012, on 12 April 2012, the appellant successfully applied for further leave to remain as a Tier 4 student, which was granted until 26 November 2013, and extended until 12 October 2015. On 13 August 2014, the appellant's leave was curtailed because the respondent considered him to have used deception in his 12 April 2012 application by relying on a proxy test-taker in a Test of English for International Communication ("TOEIC") assessment. On 2 November 2017 the appellant made an application for leave to remain on the basis of his private and family life. That application was refused on 22 January 2019, and it was that refusal that was under appeal before the judge below.
3. The appellant's November 2017 human rights claim was based on his relationship with his wife, A, their daughter, B, born in May 2018, and the private life he claimed to have established in this country.
4. The application was refused on suitability grounds, as the respondent considered that the appellant relied in his April 2012 application on an invalid TOEIC certificate following a test he purported in his application to have taken at the Premier Language Centre on 28 March 2012. Also, there would be no insurmountable obstacles to the appellant continuing family life with A and B in Pakistan. His relationship with A had been formed at a time the appellant knew his immigration status was unlawful. B had resided in this country for less than seven years. Her best interests would be served by leaving the UK with both parents, for Pakistan, the country of her nationality. Family members in Pakistan would be able to support the family unit on its return.
5. Subsequent to the appellant's application to the Secretary of State, A made a claim for asylum, with the daughter she shares with the appellant as her dependent, and that claim remains under consideration by the respondent. A had previously been granted discretionary leave to remain, which, the appellant contended, had been extended by virtue of section 3C of the Immigration Act 1971 by the submission of her asylum claim. The appellant and A also had another daughter, C, who was born in November 2019.

6. The appellant's case before the First-tier Tribunal was that it would be a disproportionate interference with his Article 8 ECHR private and family life rights, and those of his family, for him to be removed. His wife's asylum application meant that it would not be possible for her to accompany him to Pakistan in order to continue their family life there. He had not used a proxy-test taker. His solicitor had included the test result in his application without his knowledge; the appellant had passed an English for Speakers of Other Languages ("ESOL") test in November 2012, and had assumed that his solicitor had used that test certificate to support the application. He had no motive to cheat. It was the solicitor's fault that an invalid TOEIC certificate was used in support of the application.

Relevant procedural chronology

7. Before the substantive hearing in the First-tier Tribunal, a number of case management directions had been given. On 7 April 2020, in the course of vacating the scheduled substantive hearing in response to the pandemic, the acting resident judge at Hatton Cross directed the appellant to serve an "appellant's skeleton argument" ("ASA") setting out the appellant's case by reference to its key components, and gave corresponding directions to the respondent to respond to each contention in turn. Paragraph 6 of the directions stated that, "if no response is received within the said time limit it will be assumed that the respondent does not take issue with the submissions contained in the ASA."
8. The appellant served an initial ASA on 30 April 2020. There was no response from the respondent.
9. The respondent did not do so, despite further and specific directions being made requiring her to respond on 25 June, 7 August and 3 September 2020. Each set of directions raised the prospect of the respondent being taken to agree to the assertions made in the ASA in the event of an unsatisfactory response.
10. The respondent did not provide a detailed response in advance of the hearing, leading the appellant to apply, at the outset of the appeal hearing, for the respondent not to be permitted to contest the matters in the ASA submitted by the appellant.
11. In pre-hearing correspondence, the respondent refused to consent to A's asylum claim and the appellant's own fear of return being considered as a "new matter" (see letter dated 17 July 2020), but consented to the birth of C being considered as a new matter (see letter dated 13 August 2020).

The decision of the First-tier Tribunal

12. The judge refused Ms Revill's renewed application, made at the substantive hearing, to prevent the respondent from being permitted to object to the matters outlined in the ASA. In doing so, she recorded a submission from the presenting officer made at the time that, "all issues

will be fleshed out at the hearing and there would be no disadvantage to the appellant.” The judge continued in these terms, at [14]:

“I decided that the appeal will continue and if there is any issues [sic] which relates to unfairness to the appellant during the hearing due to the lack of response by the respondent, for the appellant’s counsel to raise it. This was agreed and the hearing continued.”

13. The judge rejected the appellant’s response to the respondent’s allegations that he used a proxy test taker in a TOEIC test. It was not credible that the appellant’s solicitor had acted in such a fraudulent and dishonest way in the absence of any report to the solicitor’s regulation authority or the police [33]. The appellant had made a bare allegation against his former solicitor with no evidence to substantiate it.

14. Addressing the significance of the appellant’s involvement of his solicitor in his April 2012 application, the judge said at [35]:

“Also if the appellant did not take the English language test as claims [sic], he has not given a credible reason for why he would go to a solicitor in the first place to make an application when one of the requirements of the application was having passed an English language test. This demonstrates that the appellant went to a solicitor in order to make the application without sitting in [sic] English language test and therefore he must have known that the solicitor was going to procure a false English language test on his behalf.”

15. At [36], the judge found that, because the appellant accepted he had attended his solicitor’s premises in order to sign some forms:

“it also demonstrates to me that the appellant made the application with a false certificate with his application. If the appellant had been a victim of fraud there is no credible explanation for why he did not report the matter to the police or make any effort whatsoever to get to the bottom of what happened.”

16. At [37], the judge said it was not credible that the appellant could not remember how much the solicitor had charged for preparing the application.

17. At [39], she added:

“The appellant said in his application that his friend gave him a one-bedroom flat without rent. The appellant has not provided any evidence of this friend. This suggests that the appellant was working in the United Kingdom.”

18. Having resolved the suitability question against the appellant, the judge turned to the remainder of the appellant’s case. She found at [41] that the appellant would not face “very significant obstacles” to his reintegration Pakistan, returning as a citizen of that country having lived there during his “informative” years. There was no credible reason why the appellant could not return to Pakistan pending the determination of his

wife's asylum claim; if it was successful, he would be able to apply for entry clearance to join her, and if it were not successful, she would be able to return, with their daughter, to live with him in Pakistan. His fears about not being able to secure employment or find accommodation in the meantime could not constitute a credible reason for him not to be returned: see [43].

19. The judge addressed the best interests of the appellant's children in these terms, at [44] and following:

"44. I take into account the best interests of the appellant's children in the United Kingdom who are very young and one was born very recently. I find that their best interests will not be compromised for the brief period that the appellant returns to Pakistan. If the appellant's wife [sic] asylum appeal succeeds, you can make an application to return. If it doesn't succeed than the appellant's wife and children will return to Pakistan to continue family life with him.

45. At the hearing the appellant's wife was asked why she cannot look after the children on her own after the appellant returns to Pakistan. The evidence is that the appellant's wife works on a three hour shift, three days a week. One of her daughters goes to school and the other as a baby. While I accept that the appellant must have been helping his wife while she is only out of the house for nine hours a week, that does not mean she cannot obtain the help of her friends hire [sic] a babysitter which she agrees that her friends do hire babysitters. I find that it is not disproportionate to expect the appellant to return to Pakistan and if necessary to make an entry clearance application to re-join his family in the United Kingdom in the event that his wife's asylum claim succeeds. I find that no evidence been placed before me that the temporary separation will interfere disproportionately with their protected rights."

20. The judge's global proportionality conclusions were at [54]:

"The appellant has attempted to remain in this country by fraud. He has children but the public interests must prevail over any rights of the appellant or his wife and children although I have taken into account their best interests as my primary obligation. The children will be looked after by their mother in this country and their best interests will be served until their mother's asylum application decision is made. Although I do not wish to prejudge her asylum claim, I note that the basis of her asylum claim I was told is that she had an illegitimate child with the appellant before they were married. They are both married now and have another child. It is a very weak asylum claim but my decision is not based on this."

21. The judge dismissed the appeal.

Permission to appeal

22. Permission to appeal was granted on all grounds by First-tier Tribunal Judge Andrew. The grounds contend the judge erred by:

- a. Ground 1: failing to accede to the appellant's application, made at the outset of the hearing, for the respondent to be treated as not disputing the contents of his skeleton argument, and/or failing to give reasons for refusing to accede to that application;
- b. Ground 2: failing to have regard to the unchallenged evidence that the appellant passed an ESOL test in November 2011;
- c. Ground 3: irrationally finding that the appellant's credibility was undermined by his decision to use a solicitor to assist with his 2012 application, his inability to remember how much he paid them, his admission that he signed forms at their premises, and his failure to provide evidence of a friend who later accommodated him;
- d. Ground 4: failing to make a finding as to whether it was in the best interest of the appellant's children for him to remain in the UK;
- e. Ground 5: erroneously finding that the appellant's separation from his wife and children would be "brief" when the respondent had been unable to confirm how soon the asylum claim would be resolved;
- f. Ground 6: impermissible placing weight on her view of the merits of A's asylum claim, when the respondent had refused consent for that matter to be determined by the tribunal.

23. The respondent provided a rule 24 response dated 7 January 2021. Ms Revill provided a skeleton argument for the hearing before me.

Discussion

Ground 1

24. In order to address ground 1, it is necessary to place the application Ms Revill made at the outset of the hearing before the First-tier Tribunal in context. Specific, tailored case management directions were given on a number of occasions before the substantive asylum hearing below, as part of a new case management process adopted by the First-tier Tribunal which is intended to ensure early identification of disputed and agreed issues. There had been a degree of procedural non-compliance with that process by the respondent in the run up to the substantive hearing, although it was not a flagrant refusal to engage with the pre-hearing process. The gravamen of the appellant's complaint is that the form and manner of the respondent's response was substandard, rather than non-existent. In her formal, undated response served on the First-tier Tribunal on 13 August 2020, the Secretary of State provided a "counter schedule" purporting to address the matters raised in the ASA. In all material respects, the respondent merely relied on the position as set out in the refusal letter. I accept that that was an insufficient response, as at least some of the matters in the ASA post-dated the refusal letter, such as the appellant's proffered "innocent explanation".

25. On 3 September 2021, Judge Moon refused a pre-hearing paper application made by the applicant to prevent the respondent from opposing the contents of the ASA. The judge said at paragraph (d) of the *Note and Directions* issued in response to the application:

“(d) The following observations are made in relation to the direction sought by the appellant’s representatives:

- i. It is accepted that the current position may place the appellant at a disadvantage as the respondent has now been put on notice of the appellant’s arguments and can consider in advance how to address them but that the appellant has been denied this opportunity.
- ii. If the tribunal is minded to make a direction in terms sought by the appellant, in the interests of common law fairness, a corresponding direction should also be considered which would prevent the appellant from making any submissions that are not addressed within the ASA.
- iii. There is a danger that the direction sought by the appellant will damage the quality of the evidence given by the witnesses to questions put to the witnesses in cross-examination as a result of the direction sought.”

26. In the operative directions then given, Judge Moon said:

“The application is refused. The tribunal has an obligation to take such action as is considered just. Restricting submissions made by the respondent may not be in the interests of justice. The respondent ought to be given the opportunity to make submissions in relation to an application that has such serious consequences.”

Pausing here, the application had been made on the papers, and the respondent had not had the opportunity to address the concerns raised by the appellant. The directions continued:

“2. The respondent is now on notice that the document which has been filed does not amount to a response to the ASA. The respondent is to file and serve a full response to the ASA no later than 4 PM on Friday, 25 September 2020. The response should include written reasons for the respondent’s withholding of consent for the tribunal to consider the new matter of the appellant’s fear on return to Pakistan.”

27. At paragraph 3, the directions concluded:

“If the respondent does not comply with paragraph 2 above, the appellant may reinstate this application orally, and request that the application be re-considered as a preliminary issue at the substantive hearing.”

28. Expanding upon ground 1, Ms Revill contends that the judge was invited to exercise a discretionary power under the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, and that she failed to give reasons for the manner in which she did so, or, more accurately, declined to do so.

29. In my judgment, the judge did give reasons for refusing, in effect, to strike out the respondent's defence. Her reasons were brief but sufficient. It is important to note that, on 7 August 2020, a remote Case Management Review hearing took place before Judge Moon. The note of that hearing issued by the judge identified that the issues for resolution at the substantive hearing were the suitability concerns raised by the respondent, whether the appellant would face "very significant obstacles" to his integration in Pakistan, and whether his removal would breach his rights under article 8 of the ECHR. The note also records that it was common ground that the appellant did not meet the immigration rules, and that the relationship between the appellant and A was genuine and subsisting. Thus, while the respondent's non-compliance with the directions to respond to the ASA was unfortunate, the appellant could have been in no doubt about the matters which he was expected to address at the substantive hearing.
30. In submissions before me, Ms Revill could identify no unfairness at the hearing before the First-tier Tribunal caused by the respondent's non-provision of a detailed response to the ASA. Her criticisms of the judge were founded on the principles of procedural rigour, and the importance of all parties complying with directions of the tribunal, and assisting the tribunal to further its overriding objective, and cooperating with it generally: see rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. She contended that it was an error of law for the judge not to apply the established three-stage 'relief from sanctions' test established by Denton v White [2014] EWCA Civ 906 and the associated authorities.
31. I find the judge gave sufficient reasons for refusing the application. The reasons were brief, but the judge explained that if any fairness issues arose as a result of the respondent's previous non-compliance, they could be dealt with as and when they arose. That was an approach entirely consistent with the overriding objective, which is to facilitate the participation of all parties, and to deal with cases fairly and justly. The relief sought by the appellant was draconian. In effect, it would have prohibited the respondent from challenging the case advanced by the appellant, which would be a very serious step to have taken, especially given the respondent had already indicated at the CMR before Judge Moon what the disputed issues were. The judge was entirely correct to address the matter by reference to the fairness of the hearing, if it were to entail a substantive challenge by the respondent to the contents of the ASA. While procedural rigour is very important, the principle must be applied in such a way which does not extinguish a party's ability to participate in the proceedings altogether for no good reason. No further reasons were required for proceeding to conduct a substantive trial of the issues.
32. Nothing turns on the judge not addressing the strike out request (for that is what it was) by reference to the Denton v White criteria (that is, the significance of breach; whether there was a good reason for it; and to consider all the circumstances of the case to deal with the application

justly). She was not invited to do so by Ms Revill, who appeared below. The operative analysis conducted by the judge was by reference to the fairness of the respondent being able to maintain the objections she raised at the CMR on 7 August 2020, some three months before the hearing. Those brief considerations form the focus of the matters the judge would have had to consider under the third stage of the Denton criteria in any event. This is a criticism of form over substance.

33. The relief the appellant sought was draconian: to prevent the respondent from being able to contest matters in the ASA, even though the appellant was on notice as to the disputed issues, pursuant to the CMRH on 7 August 2020. While procedural rigour is important in this jurisdiction, it would have been an extreme step to prevent a party from arguing its case in circumstances where to do so, as confirmed by Ms Revill, exposed the opposing party to no prejudice. As to the sufficiency of reasons facet to this ground of appeal, few reasons are required to enable a party to enjoy its right to have its case heard and considered. It was entirely open to the judge to approach matters on the basis of fairness, and in doing so she gave amply sufficient reasons for allowing the matter to proceed.

Grounds 2 and 3

34. It is convenient to consider grounds 2 and 3 together. The first reason given by the judge for rejecting the appellant's claimed innocent explanation was because she did not accept his account that his solicitor had fraudulently obtained the invalid TOEIC certificate on his behalf. At [33] the judge gave reasons that were open to her that, in the absence of any police involvement or regulatory referral concerning that very serious allegation he made against his former solicitors, she rejected that account. See [33]. Merely not mentioning the ESOL is nothing to the point, as the appellant's prior ability to speak English would have been incapable of curing his wholly incredible account that his solicitor had committed criminal offences on his behalf. Even those competent in the English language have cheated in TOEIC tests; the ESOL certificate was one factor set against the background of the appellant's account. Appellate tribunals should be slow to infer that an expert tribunal has not taken a factor into account merely because it has not been expressly mentioned. See MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 at [45]:

“...where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account.”

35. Had the judge's analysis stopped there, no complaint could have arisen. However, the remaining aspects of the judge's analysis of the TOEIC issue are contradictory and fatally undermine the first part of her analysis.
36. Having rejected the solicitor's role in the fraud at [33], at [35] the judge then appears to accept that the solicitor *did* fraudulently procure the certificate for the appellant. It is worth quoting [35] again:

“This demonstrates that the appellant went to a solicitor in order to make the application without sitting in [*sic*] English language test and therefore he must have known that the solicitor was going to procure a false English language test on his behalf.”

37. The above analysis flatly contradicts the otherwise sound findings the judge had already reached.
38. The confusion continues at [36] when the judge again appears to conclude that the appellant’s former solicitor had a role of sorts, by submitting a fraudulently obtained certificate with the appellant’s application. However, also at [36] the judge suggests that the appellant was the fraudulent actor and that it was not the solicitor who procured the “form”. These conclusions are difficult to reconcile with those stated at [33] and [35]. It is simply not clear whether the judge found the solicitor to be complicit (as she suggests at [35]), or rejected the suggestion as incredible (as she did at [33]). The analysis at [36] is again less clear, and suggests that the appellant is culpable simply because he sought the assistance of a solicitor with an immigration application, which cannot amount to a rational basis for rejecting an innocent explanation.
39. While I am mindful of the restraint with which this tribunal should approach findings of fact reached by the First-tier Tribunal, the judge’s analysis of the TOEIC issue was contradictory and so irrational. That was an error of law. Those findings must be set aside.

Grounds 4 to 6

40. While ground 4 was characterised as a challenge to the judge’s *failure* to assess the best interests of the appellant’s children, properly understood it is a challenge to the assessment of their best interests that the judge conducted. As set out at paragraph 19, above, she considered the best interests of the children to be to remain here with their mother. At [45] of her skeleton argument, Ms Revill states that the judge failed to address the need for the children to have ongoing contact with their father, or “to explain why his presence is irrelevant to those best interests.”
41. The context for the assessment of the appellant’s children’s best interests in the present matter is atypical. A has claimed asylum with B as her dependent. The appellant and A have since had a further child, C. Until A’s asylum claim (and that of B as her dependent) has been finally determined, neither A nor B can be removed, and there is no possibility of the family relocating to Pakistan. That is not to say that the appellant’s removal could never take place while A and B remain in this country – the proportionality of the appellant’s removal is a distinct matter from the assessment of the best interests of his children, although should take account of it – but one would expect the judge to have addressed factors such as the extent to which ongoing contact would be possible during the period of separation, and to explain why the appellant’s presence in the UK, as their father, would not be required, when addressing the children’s best interests. I have not been alerted to any safeguarding or other

concerns which would mitigate against the appellant's presence in the country being in the best interests of his children, thereby enabling the family unit to remain as a single unit. Yet those were factors that the judge did not address, thereby failing to take into account relevant considerations.

42. Allied to those deficiencies, the judge's categorisation of the appellant's likely period of separation from A and the children as "brief" fails to engage with the likely timescale involved in the determination of the asylum claim. When addressing the best interests of children, it is necessary to be as precise as possible. While the judge cannot be criticised for not being able to predict the likely timescale involved in the determination of A's asylum claim with precision (including any appeals in the event it is refused), merely casting off any separation as "brief" fails to engage with the likely reality of the time taken to determine an outstanding asylum claim. The judge may have been influenced by her view on A's "weak" asylum claim: see [54]. That was an impermissible consideration; the merits of A's asylum claim were not an issue in relation to which the First-tier Tribunal was constituted to address, and the Secretary of State had specifically declined to consent to the tribunal considering it. That observation went beyond the jurisdiction of the tribunal and was, by definition, an irrelevant consideration. Even if the asylum claim was "weak", it would not necessarily be *bound to fail* and so be suitable for certification as "clearly unfounded", with the consequence that the possibility of a prolonged process of legal challenge could not have been excluded by the judge. I find that the judge failed to address the best interests of the appellant's children by reference to the "real world" within which the children, A and the appellant currently reside. That was an error of law.

Conclusion

43. In light of my findings concerning the extent of the errors of law in the decision of the First-tier Tribunal, I consider that it is appropriate to set the decision of Judge Chana aside in its entirety, with no findings of fact preserved. In light of the extent of findings of fact that are required, I remit the case to be reheard in the First-tier Tribunal, before a different judge.

Anonymity

44. In light of the connected asylum claim, and the involvement of children, I consider that an anonymity order is appropriate.

Notice of Decision

The decision of Judge Chana involved the making of an error of law and is set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal, to be heard by a different judge.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Stephen H Smith*

Date 26 May 2021

Upper Tribunal Judge Stephen Smith